Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977
No. 77-471

DONALD C. McDOUGAL,

Appellant,

vs.

COUNTY OF IMPERIAL,

Appellee.

MOTION TO DISMISS.

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DONALD C. McDOUGAL,

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COUNTY OF IMPERIAL,

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MOTION TO DISMISS.

Appellant appeals from the judgment of the Supreme Court of California in *County of Imperial v. McDougal*, 19 Cal. 3d 505 (1977). This motion requests that the Supreme Court of the United States refuse to assume jurisdiction of the appeal because (1) the federal question sought to be reviewed was not expressly passed on by the California Supreme Court; and, (2) the judgment of the State Court rests on an adequate non-federal basis.

Statement of the Case.

Appellee hereby incorporates by reference the recital of facts contained in *County of Imperial v. McDougal* (see Appendix "A" of Appellant's Jurisdictional Statement, commencing with A-1). Additionally, Appellee wishes to correct certain statements of "fact" made by Appellant which constitute legal conclusions having no support in the California Supreme Court's opinion.

Appellant states that he ". . . operated under a Use Permit issued by Appellee in 1967, allowing commercial sale of water upon the premises" and he further asserts that "[t]he rights under said permit had wholly vested in the Appellant's predecessor in interest, W. [Erle] Simpson, and Appellant has succeeded to said interest as a vested property right which ran with the land" (Jurisdictional Statement at p. 7). Said statements constitute a mischaracterization of the case as shown by findings of the California Supreme Court.

Following a hearing in 1967, Mr. Simpson was issued a use permit which contained the condition prohibiting

the sale of water for use outside the County (A-6). Mr. Simpson was represented by counsel at the hearing and he [Simpson] "voluntarily withdrew from his application a request to export water to Mexico" (A-6). Thereafter, Simpson accepted the benefits afforded by the permit and conducted himself in accordance therewith (A-6).

The State Supreme Court made the following findings with regard to Appellant:

> "When McDougal purchased the property in 1972, he was aware of the restriction against the sale of water for export from the county and knew that Simpson had not made intensive commercial use of the well. McDougal requested the board of supervisors to remove the export limitation, but he was advised that a conditional use permit would be required to accomplish this result. Without applying for such a permit, he entered into contracts to sell water for distribution in Mexico, and beginning in July, 1972, as many as 44 trucks a day, with a capacity of 250,000 gallons, loaded water at the well, day and night" (A-3).

In characterizing Appellant's status, the State Supreme Court rejected the attempt to assert greater rights than those held by his predecessor and stated "[i]t is equally clear, . . . that McDougal is subject to the limitations in the permit under which he claims, and that he can assert no greater rights therein than Simpson enjoyed" (A-6).

ARGUMENT.

I

The Federal Question Sought to Be Reviewed Was Not Expressly Passed on by the California Supreme Court.

After making the determinations discussed above, the California Supreme Court concluded:

> "A number of cases have held that a landowner or his successor in title is barred from challenging a condition imposed upon the granting of a special permit if he has acquiesced therein by either specifically agreeing to the condition or failing to challenge its validity, and accepted the benefits afforded by the permit. [citations omitted] Thus McDougal is estopped to assert that the prohibition in the Simpson permit against the sale of water for use outside the county is invalid, and he is bound by the limitation" (A-6 - A-7).

As a footnote to its holding, the Court said: "In view of this conclusion, we need *not* decide whether the prohibition against the export of water was valid" [citing authorities] (A-7).

Moreover, the State Supreme Court rejected Appellant's attempt to raise a new contention by petition for rehearing, as follows:

> "McDougal asserts for the first time the contention that because Simpson was required to accept the prohibition against the export of water as a condition of obtaining the permit, any waiver of rights by him was invalid because made under duress. We have consistently refused to consider points on rehearing not previously raised in the

Court of Appeal or in this court" [citing authorities] (see Appendix "C" to the Jurisdictional Statement).

Thus, it is clear that the California Supreme Court did not expressly pass on the federal question sought to be reviewed by Appellant. Furthermore, the attempt of Appellant to interject the issue of duress was not timely or properly raised below.

Rule 16 1(b) of the Rules of the United States Supreme Court provides in relevant part as follows:

> "The court will receive a motion to dismiss an appeal from a state court on the ground that it does not present a substantial federal question; or that the federal question sought to be reviewed was not timely or properly raised, or expressly passed on; or that the judgment rests on an adequate nonfederal basis."

This Court has consistently refused to note probable jurisdiction of an appeal from a state court judgment resting exclusively on an adequate non-federal ground. *Johnson v. New Jersey,* 384 U.S. 719, 735 (1966); *McCoy v. Shaw,* 277 U.S. 302 (1928), see also ROBERTSON AND KIRKHAM, JURISDICTION OF THE UNITED STATES SUPREME COURT §89-103 (2d ed Wolfson and Kurland 1951); STERN AND GRESSMANN, SUPREME COURT PRACTICE (4th ed. 1969) 105-113; *The Inadequate State Ground,* 65 COL. L. REV. 943 (1965); *Henry v. Mississippi and the Adequate State Ground,* 1965 S. CT. REV. 187 (1965); Comment 61 COL. L. REV. 255 (1961), Comment, 74 HARV. L. REV. 1376; Comment 49 YALE L. REV. 1463. Civil appeals dismissed for lack of a federal question are numerous. See for example *Broad River Power Co. v. State of South*

Carolina ex rel. Daniel, 281 U.S. 537, 540-541 (1930); *Nickel v. Cole,* 256 U.S. 222, 225-226 (1921); *Leathe v. Thomas,* 207 U.S. 93, 99 (1907); *Chapman v. Goodnow's Administrator,* 123 U.S. 540, 548 (1887).

As noted, the California Supreme Court did not address the federal question which appellant sought to raise. Moreover, as the following discussion demonstrates, the Court relied on an adequate and independent ground for its decision.

II

Estoppel Is an Adequate and Independent State Ground Which Precludes Review of the California Supreme Court Decision.

As pointed out above, the substantive premise of the California Supreme Court's opinion was estoppel. The Court did not reach the alleged federal question of the relationship between the permit restriction and the commerce clause. Previous decisions of this Court clearly hold estoppel is a non-federal ground broad enough to sustain a state court decision.

The most widely cited estoppel case is *Enterprise Irrigation District v. Farmer's Mutual Canal Co.,* 243 U.S. 157 (1916). In *Enterprise,* this Court was called upon to determine relative rights of the parties to divert the waters of a river for irrigation. Discussing the Nebraska Supreme Court decision, the Court stated:

> "As has been shown, several questions were presented to the Supreme Court and all were considered. One was whether the state board's decision could be given any conclusive effect consistently with the due process and equal protection

clauses of the 14th amendment, and another was whether the defense of estoppel in pais was well founded. The first was plainly a federal question and the other was plainly non-federal . . . In such situations our jurisdiction is tested by inquiring whether the non-federal ground is independent of the other ground and broad enough to sustain the judgment. Where this is the case, the judgment does not depend on the decision of any federal question and we have no power to disturb it . . . It is not urged, nor could it be, that, as a ground of decision, the estoppel is not broad enough to sustain the judgment . . . It results from what we have said that the judgment is one which is not open to review by this court" 243 U.S. 157, 163-166.

The *Enterprise* decision is discussed approvingly in Professor Wright's treatise. (*See* FEDERAL PRACTICE AND PROCEDURE, (Wright and Miller ed. 1977, 784); also see ROBERTSON AND KIRKHAM, JURISDICTION OF THE UNITED STATES SUPREME COURT (2d ed. Wolfson and Kurland 1951) 183-185.)

In *Pierce v. Somerset Railway*, 171 U.S. 641 (1898), the Supreme Court of Maine had been presented with the federal question of whether a state statute impaired the obligations of a contract in a mortgage, thereby violating the contract clause of the U.S. Constitution. However, the state court decided the case by upholding the defense of estoppel. This Court declined review, holding that the "question whether the defense of estoppel . . . is established is not a federal question." 171 U.S. 641, 648.

Similarly, in *Lowry v. Silver City Gold and Silver Mining Company*, 179 U.S. 196 (1900), a writ of error was dismissed because one ground of the decision "sufficient to dispose of the case" was that the lessees were estopped to contest the rights of the lessor. 179 U.S. 196, 198.

Estoppel was found to be an adequate and independent state ground in all of the following cases. *Moffet v. Commerce Trust Company*, 329 U.S. 669 (1946); *McSweeney v. Equitable Trust Co.*, 315 U.S. 785 (1941); *Twin Falls County v. Henderson*, 305 U.S. 568 (1938); *Waesche v. Thurmont Bank*, 305 U.S. 560 (1938); *Southern Nebraska Power Co. v. Nebraska ex rel. Sorenson*, 299 U.S. 520 (1936); *Bell Telephone Co. of Pennsylvania v. Van Dyke*, 296 U.S. 533 (1935); *Utley v. City of St. Petersburg*, 292 U.S. 106, 111-112 (1933); *Beals v. Cone*, 188 U.S. 184, 186 (1903); *Hale v. Lewis*, 181 U.S. 473, 479-480 (1901); *Gillis v. Stinchfield*, 159 U.S. 658, 660 (1895); *Michigan v. Flint*, 152 U.S. 363, 368 (1894); *Israel v. Arthur*, 152 U.S. 355, 362 (1894); *Sherman v. Grinnell*, 144 U.S. 198, 202 (1892); *Marrow v. Brinkley*, 129 U.S. 178, 181 (1888); *Adams Co. v. Burlington and M. River R. Co.*, 112 U.S. 123, 127-129 (1884); *Gibson v. Chouteau*, 111 U.S. 200 (1869).

Two cases in which this Court denied review of state court decisions premised on estoppel are of particular interest. *Mobile, Jackson and K.C. R. Co. v. Mississippi*, 210 U.S. 187, 204 (1907); *Rutland R. Co. v. Central Vermont R. Co.*, 159 U.S. 630, 640 (1895). Both of these appeals were dismissed even though interference with interstate commerce was alleged.

Conclusion.

The California Supreme Court decision in *County of Imperial v. McDougal* is based on the adequate, independent and tenable ground of estoppel. The opinion does not address the federal question of interference with interstate or foreign commerce. Therefore, the County of Imperial respectfully requests this Court to dismiss the appeal for failure to raise a substantial federal question. The decision below was based on an independent state ground broad enough to meet the tests of adequacy set forth in the opinions of this Court.

Dated: October 21, 1977.

Respectfully submitted,

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